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NO. 87-222

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

FRED SILVER,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

Whether the trial court properly denied petitioner's motion to quash a search warrant where, in light of the totality of the circumstances presented to the issuing magistrate, there existed a solid and ample factual basis for a finding that probable cause existed for the issuance of that warrant.

Whether the issuing judge was somehow rendered impartial by simultaneously considering virtually identical affidavits in support of both the request for a search warrant and the application for judicial approval to record petitioner's phone conversations.

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OPINION BELOW

Pursuant to a stipulated bench trial before the Honorable James J. Heyda, the petitioner pled guilty to possession of a controlled substance with intent to deliver and delivery of a controlled substance. His conviction was affirmed by the Appellate Court of Illinois and is reported at 151 Ill. App. 3d 156, 502 NE.2d 1141 (1st Dist. 1986). See Petitioner's Appendix at 1a-8a. Petitioner's petition for rehearing was

denied on January 27, 1987. See Petitioner's Appendix at 9a. Petitioner's petition for leave to appeal to the Supreme Court of Illinois was denied on June 4, 1987. See Petitioner's Appendix at 10a.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. sec. 1257(3). However, as treated more fully below, respondent submits that no good reason exists for this Court to grant the instant petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent accepts petitioner's version of the procedural facts of this case, as set forth in petitioner's petition for writ of certiorari at pages 2-4. The facts

upon which both the trial court, as well as the Appellate Court of Illinois, based their findings that probable cause existed for the issuance of a search warrant are fully set forth in the complaint for the search warrant, reprinted in its entirety in Petitioner's Appendix at pages 12a-19a, and are abbreviated, in relevant part, in the argument portion of this Brief in Opposition.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

BECAUSE THE APPELLATE COURT OF ILLINOIS CORRECTLY APPLIED THE "TOTALITY OF THE CIRCUMSTANCES" APPROACH, AS SET FORTH IN ILLINOIS V. GATES, IN ARRIVING AT ITS DETERMINATION THAT PROBABLE CAUSE EXISTED FOR THE ISSUANCE OF A SEARCH WARRANT, AND BECAUSE SIMULTANEOUS CONSIDERATION OF MULTIPLE DOCUMENTS IN SUPPORT OF REQUESTS FOR WARRANTS RAISES NO ISSUE OF INTRINSIC IMPORTANCE, NOR IS THERE CONFLICT AMONG THE JURISDICTIONS, THIS PETITION FOR WRIT OF CERTIORARI IS UNWORTHY OF SUPREME COURT REVIEW, AND SHOULD BE DENIED.

Petitioner Fred Silver petitions this Honorable Court for a writ of certiorari

to the Appellate Court of Illinois, claiming, first, that the Appellate Court of Illinois improperly determined that probable cause existed upon which to issue a warrant and, second, that the issuing judge was somehow rendered impartial because he simultaneously considered affidavits supporting both the request for the search warrant and the application for judicial approval to record petitioner's telephone conversations. The People of the State of Illinois maintain, however, that, for the reasons stated below, the grounds raised by petitioner do not form a sufficient basis upon which to grant a writ of certiorari. The instant petition should therefore be denied.

First, petitioner urges this Court to grant the writ of certiorari in this case "in order to reaffirm the necessity of the presence of probable cause before a judge

permits the issuance of a search warrant." (Petitioner's petition at p.4) That is, petitioner raises no unique constitutional question. Rather, resolution of this issue is purely a matter of fact and was correctly decided against petitioner by the Appellate Court of Illinois.

There is no question between the parties that this Court's decision in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983) is determinative of this issue. In Gates, this Court held that in determining whether there was probable cause to issue a search warrant, a reviewing court must look to the totality of the circumstances. Gates, 462 U.S. at 238. That is, whether the complaint is sufficient depends upon whether the complaint, considered as a whole, adequately establishes that there was a fair probability that evidence of a crime would be

found in a particular place. Id. Thus, the task of an issuing magistrate is simply to make a practical common sense decision whether, given all the circumstances set forth in the affidavit, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, if any, there is a fair probability that contraband or evidence of a crime will be found. Id. In addition, where an affidavit includes information provided by a confidential informant, the credibility of that person, as well as the reliability of the information provided, may be established upon a showing that the informant has provided the affiant with reliable information on previous occasions. McCray v. Illinois, 386 U.S. 300, 311, 87 S. Ct. 1056 (1967).

In the instant case, the Appellate Court of Illinois properly and accurately applied the Gates "totality of the circumstances" approach in arriving at its determination that probable cause existed for the issuance of a search warrant. The facts upon which the trial court based its finding of probable cause are fully set forth in the complaint for the search warrant, reprinted in its entirety in Petitioner's Appendix at pages 12a-19a, and are here abbreviated for the sake of clarity and economy.

As the result of an ongoing undercover investigation of the petitioner, which spanned a period of three months, the affiants, special undercover narcotics agents Claude Kaysen and Victoria Gadomski, filed a seven page complaint for a search warrant. (Petitioner's petition at p. 12a) This complaint was highly particularized and

detailed several transactions between affiant Kaysen and one Scott Prisant, a drug dealer. During five of the encounters, Prisant delivered various quantities of white powder, all of which subsequently tested positive as cocaine. On four of these occasions, after receiving the required amount of money from the affiant, Prisant stated that he was going to the home of his "source" to purchase the cocaine ordered by the affiant and would return immediately. On each of these occasions, Prisant was kept under constant surveillance by a team of undercover narcotics agents from the time he left affiant until he returned. Each time, Prisant went directly to the home of petitioner, where he was observed with petitioner, and then returned to affiant with the ordered amount of cocaine. Prisant made no other stops, excepting one occasion upon

which he had advised the affiant that he was going to drop a gram of cocaine off at "Jim's" on the return trip. In accord with this statement, Prisant was observed stopping briefly at an address which was subsequently checked and found to be the residence of one Jim De Pietro. On one of these occasions, prior to leaving for Petitioner's residence, Prisant placed a telephone call and ordered cocaine. Affiant Kaysen observed the number which Prisant dialed and subsequent check of that number revealed that it was listed to petitioner.

In addition to the detailed observations of the affiants themselves, as well as those of other agents involved in the investigation, affiant Kaysen also included in the complaint that he had received information from a confidential informant that Prisant's source of cocaine was the

petitioner Fred Silver and also supplied the affiant with the petitioner's address. Affiant Kaysen further stated in the complaint that this informant had given him information within the previous six months which resulted in three recoveries of controlled substances, all of which had been laboratory tested.

Thus, the affidavit in this case provided a solid and ample factual support for a finding that probable cause existed for the issuance of a search warrant. Because petitioner raises no unique constitutional issue, and because the opinion of the Appellate Court of Illinois was a correct and accurate application of the law, the petition for writ of certiorari should be denied.

Secondly, Petitioner claims that because the judge who issued the search warrant simultaneously considered the

application for judicial approval to record Petitioner's telephone conversations, this somehow rendered his determination less than neutral and detached. This argument, however, misunderstands the nature of the "neutral and detached magistrate" requirement and is without merit. This Honorable Court has repeatedly expressed a preference for searches made pursuant to a search warrant because the warrant process interposes an orderly procedure involving judicial impartiality. United States v. Ventresca, 380 U.S. 102, 85 S. Ct. 741 (1965); Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367 (1946). That is, the warrant process allows a neutral and detached magistrate, one not "engaged in the often competitive enterprise of ferreting out crime," to make informed determinations on the issue of probable cause. Johnson v. United States, 333 U.S. at

14. See e.g., Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022 (1971) (state's attorney general who was later to serve as chief prosecutor at trial found not to be "neutral and detached" for purpose of issuing search warrant); Connally v. Georgia, 429 U.S. 245, 97 S. Ct. 546 (1977) (unsalaried justice of the peace who received five dollars for each warrant issued found not to be "neutral and detached"). The concern, therefore, is not the form in which the information is presented to the magistrate, but whether the magistrate himself is sufficiently removed from the prosecution and police, and is otherwise without incentive, to make an impartial and informed determination of whether probable cause exists to issue a search warrant.

Courts have found that there is no inherent defect in utilizing multiple

affidavits in support of a request for a search warrant. See United States v. McCoy, 781 F.2d 168 (10th Cir. 1985); State v. Gamage, 340 A. 2d 1 (Me. 1975); Commonwealth v. Saleh, 369 Mass. 406, 486 N.E.2d 706 (1985); State v. Boushee, 284 N.W.2d 423 (N.D. 1979). Likewise, there is no inherent defect in a magistrate being provided with factual information from affidavits supporting requests for different types of warrants. On the contrary, courts in the various jurisdictions have permitted reliance upon facts appearing in affidavits for related arrest and search warrants which were contemporaneously obtained. See e.g., State v. Smith, 295 Minn. 65, 203 N.E.2d 348 (1972) (held that where search warrant affidavit was insufficient because it failed to state source of affiant's beliefs, defect was not fatal because the missing information

appeared in a separate affidavit for an arrest warrant presented to, and simultaneously considered by, the same magistrate); Tucker v. State, 403 So.2d 1274 (Miss. 1981) (held that where magistrate had before him related affidavits for search of motel room and for search of car, it was proper for him to consider facts in both affidavits in determining probable cause for each of the requested search warrants); State v. Mondo, 325 N.W.2d 201 (N.D. 1982) (failure in affidavit for search warrant to state the date of the offense was cured by its inclusion in affidavit for arrest warrant which was filed contemporaneously and considered by the magistrate).

While this Court has never explicitly addressed this issue, it has suggested that the issuing magistrate need not rely solely on the affidavit supporting a

request. In Aguilar v. Texas, 378 U.S. 108, 89 S. Ct. 584 (1969), this Court considered the sufficiency of an affidavit which stated only that the affiant had received "reliable information from a credible person." Aguilar, 378 U.S. at 109. In finding no probable cause existed to issue the search warrant, the Aguilar court noted that:

> [I]n passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention [and that if facts other then those contained in the affidavit] had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

Id. (emphasis added). In the instant case, the Appellate Court of Illinois found both the affidavit supporting the request for a search warrant and the affidavit for judicial approval to record petitioner's telephone conversations to be virtually the same. (Petitioner's Appendix at 7a.) However, even assuming arguendo that additional information was contained in either affidavit, this in no way renders the magistrate less impartial, but only more informed. Because there is no intrinsic importance to this second issue raised by petitioner, and because no conflict exists among the circuits, the petition for writ of certiorari should be denied.

In any event, the necessity to resolve either of these issues is obviated by this Court's decision in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984). Leon held that evidence obtained by police

officers acting in reasonable reliance on a search warrant, valid on its face, is admissible even though that warrant later proves defective for lack of probable cause for its issuance. Leon, 468 U.S. 897, 920-22. This Court reasoned that since the exlusion of evidence was intended to deter police from making illegal searches and seizures by taking away the incentive to do so, that this deterence justification virtually loses its meaning when police act in an objectively reasonable manner on what they believe to be a valid warrant. Id. at 916-19. Petitioner does not claim, nor did he claim on appeal below, that the officers had anything other than an objectively reasonable belief that they were acting pursuant to a validly issued search warrant. Nor is there any suggestion that the issuing judge was misled by information that the

affiant knew was false, or that the warrant was in any way facially defective. See Leon, 468 U.S. at 923. As the petitioner has failed to raise any important constitutional issue or present any grounds which would justify consumption of this Court's time, this case is unworthy of Supreme Court review and the instant petition for writ of certiorari should be denied.

CONCLUSION

For all the foregoing reasons, Respondent respectfully prays that this Honorable Court deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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